No. 3089

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED VERDE COPPER COMPANY, a corporation,
Plaintiff in Error,

vs.

NICK KUCHAN,
Defendant in Error.

Brief of Defendant In Error

F. C. STRUCKMEYER,

J. S. JENCKES,
Attorneys for Defendant
in Error

ARIZONA STATE PRESS, PHOENIX, ARIZ.

United States Circuit Court of Appeals, for the Ninth Circuit.

UNITED VERDE COPPER COMPANY, a corporation, Plaintiff in Error, vs. NICK KUCHAN, Defendant in Error.	BRIEF OF DEFENDENT IN ERROR

POINTS AND AUTHORITIES

I.

THE DUTY IMPOSED BY THE ACT IN QUESTION, TO GIVE WARNING IN EACH DIRECTION BEFORE FIRNG CHARGES, IS A DUTY IMPOSED UNDER THE POLICE POWER OF THE STATE, AND, THEREFORE, OPERATIVE ALIKE UPON THE OWNER AS UPON THOSE EMPLOYEES IN IMMEDIATE CHARGE OF THE PLACE OF THE INTENDED BLASTING.

TITLE OF ACT, CH. 33, LAWS OF ARIZONA, 1912, R. S.

THOUGH IT BE CONSTRUED AS IMPOSING A DUTY UPON THE EMPLOYEE OR PERSON IN IMMEDIATE CHARGE OF THE PLACE OF SUCH INTENDED BLASTING, IT BEING MANIFESTLY FOR THE PROTECTION OF THE CO-

EMPLOYEES, THE NEGLECT OF SUCH PERSON TO OBSERVE THE DUTY IS IMPUTABLE TO THE EMPLOYER, FOR, THE "FELLOW SERVANT" RULE HAVING BEEN ABROGATED IN THE STATE OF ARIZONA, *RESPONDEAT SUPERIOR* APPLIES, AND IS NEGLIGENCE PER SE OF THE EMPLOYER.

Sec. 4. Art. XVIII Const. of Arizona
5 Labatt Master and Servant Sec. 1909.

III.

THE FAILURE TO GIVE WARNING IS THE ONLY NEGLIGENCE CHARGED IN THE COMPLAINT. THE PLAINTIFF IN ERROR, DURING THE ARGUMENT AT THE TRIAL, CONCEDED ITS LIABILITY AND THIS LIABILITY SHOULD NOT NOW BE QUESTIONED ON APPEAL. THE VERDICT AND JUDGMENT NOT BEING CLAIMED EXCESSIVE DAMAGES, THE APPEAL IS FRIVOLOUS AND MANIFESTLY PROSECUTED FOR DELAY ONLY, AND THE JUDGMENT SHOULD BE AFFIRMED WITH DAMAGES UNDER RULE 30 OF THIS COURT.

ARGUMENT

I.

The Act of the Arizona Legislature under consideration is Chapter 33, Laws of 1912, Regular Session, the

cause of action being based upon the omission of a duty imposed by paragraph (e) of such Act. The title of the Act is a conclusive refutation of the argument advanced by the plaintiff in error; it reads, "An Act relating to the office of mine inspector; * * * regulating the operation anl equipment of all mines in the State of Arizona; providing regulations securing the health and safety of workers therein, and providing penalties for violation of the provisions of this Act."

If more be needed than the title of the Act, further argument is found in paragraph (a) of section 19 of the Act, providing:

> "All explosives must be stored in a magazine *provided for that purpose* only, etc."

In this paragraph the name "operator," "owner," "employer," or like words are not used, but it is self evident that this duty here commanded of providing a magazine cannot be performed by anyone except the owner.

Likewise, in paragraph (e), the name "owner" is not used, but it is absurd to say that the owner, not being *eo nomine* referred to, is relieved from the responsibility of seeing that such warning is given, by such warning accomplishing that which the Legislature provided for, namely, securing the health and safety of workers in the mines.

Further on, the same paragraph provides:

> "If the shots are fired by electricity, the place

must be carefully examined before men are permitted to work therein."

If this section imposes no duty upon the owner or master, I would like to ask who is to extend this permission?

II.

The second point made by the defendant in error would seem to be obvious.

> "The common law doctrine of fellow servants, so far as it affects the liability of a master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master, is forever abrogated."—Sec. 4, Art. XVIII, Constitution of Arizona.

The court instructed the jury that to give warning was a duty imposed upon mining companies, and that the failure to give such warning constituted negligence on the part of the plaintiff in error. The use of the words "mining companies," if technically incorrect, certainly was not prejudicial if the failure to give such warning was the neglect, *respondeat superior*, of the plaintiff in error.

The failure to give warning was the omission of a statutory duty, enacted under the police power of the state, to secure the health and safety of persons working in mines; and if such neglect stood in causal relation to the injury—was the proximate cause of the injury—then the liability was clearly established, contributory negligence having been expressly withdrawn from the

consideration of the jury by statement of counsel for plaintiff in error.

> "Thereupon, Mr. Anderson, counsel for the defendant in his argument to the jury stated that * * * he did not claim in this case that the plaintiff was guilty of contributory negligence."—Trans. of Rec., p. 69-70.

The argument that such omission was only "evidence" of negligence is devoid of merit, based on a loose or inaccurate use of language by a few appellate courts. If a statutory duty is omitted, this is an omission which, resulting in injury, becomes actionable: negligence. The omission being conceded, or not, controverted, and injury shown, then a question of fact as to the proximate cause of such injury arises, which, attributed to such omission, establishes the liability. Illustration (not original): If the statute requiring a fire escape be ignored, (omission) and a person be burned up (injury) for lack of a fire escape (causal relation), how would it sound to say to a jury that the failure to furnish the fire escape is only some evidence of liability, and that it is for them to say if it be enough?

> "The theory under which the breach of a mandatory or prohibitory statute is treated as negligence *per se* in respect of an employee injured by reason of the breach is sustained by a decided preponderance of authority. That this is the correct position can scarcely be doubted. It is submitted that doctrines the essential effect of which is that the qual-

ity of an act which the Legislature has prescribed or forbidden becomes an open question, upon which juries are entitled to express an opinion, are highly anomolous."—5 Labatt's Master and Servant, Sec. 1909, p. 5953.

III.

Mr. Anderson, counsel for the plaintiff in error, in his argument to the jury stated that notwithstanding, he contended there was no negligence on the part of the plaintiff in error, he was willing that the jury bring in a verdict for $7,500.00, but that he was not wliling that they bring in a verdict for more than $7,500.00, unless the jury believed the plaintiff in error was guilty of negligence. It is impossible to understanl the purpose of counsel in signifying his readiness to accept a verdict of $7,500.00, unless that it was an admission of liability at least to that extent. The answer did not contain an offer to pay this amount as the damage sustained. The case was tried upon the issue: liable or not liable. The only cause of action charged was failure to give warning. This cause of action, at least to the extent of $7,500.00, was conceded. Apparently, the jury did not deem $7,500.00 a sufficient compensation for the frightful injuries received by defendant in error. The amount awarded, $25,000.00, inded is rather low. This court will not permit counsel to "blow hot and cold with the same breath." Liable or not liable? That was the issue joined and to be submitted to the jury. Will this court

reverse *in toto* where counsel have conceded liability but the jury disagreel with him as to the measure of damages? These damages are not, as could not be, claimed to be excessive. Does it not present a case where the plaintiff in error is evidently chagrined at the verdict of the jury, and, therefore, has manifestly prosecuted this appeal for delay? Gentlemen as learned in the law as counsel for plaintiff in error must have, when preparing this appeal, realized the barrenness of theircontention.

If the view here taken by counsel for defendant in error impresses itself upon this court, we ask for an affirmance of judgment with damages in conformity with rule 30 of this court.

Respectfully submitted,

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Attorneys for Defendant in Error.